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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY KENNETH HERZOG,

Petitioner - Appellant,

v.

JOAN PALMATEER, Superintendent,

Respondent - Appellee.

No. 02-36105

D.C. No. CV-00-06066-ALH

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Submitted November 6, 2003**
Portland, Oregon

Before: ALARCON, RAWLINSON, Circuit Judges, and BYBEE, Circuit Judge.

Appellant Gary Herzog appeals the district court's denial of his habeas petition. Herzog contends that his trial counsel acted ineffectively by not

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** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

conducting a personal inspection of an FBI database used to determine the likelihood that he was the source of semen found on two of the victims. We disagree. Even assuming defense counsel should have investigated the database, Herzog has not established a reasonable probability that the outcome of his trial would have differed. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). All four victims identified Herzog as their attacker, matched his clothing to the outfit worn by their assailant, and furnished a number of intimate details about the interior of Herzog's truck. Further, the prosecution introduced a considerable amount of probative, non-DNA physical evidence.

AFFIRMED.